FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT DUNN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 70-80) is reported at 577 F.2d 119.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. The petition for a writ of certiorari was filed on June 20, 1978, and was granted on December 11, 1978 (A. 82). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the sworn statement that was alleged to be inconsistent with petitioner's grand jury testimony was made in a "proceeding * * * ancillary to a court," within the meaning of 18 U.S.C. 1623(c).

2. Whether a witness who has testified before a grand jury under a grant of immunity and subsequently gives contradictory non-immunized testimony in a proceeding before or ancillary to a court may have his immunized testimony used against him in a false declarations prosecution based on the inconsistent statements theory of 18 U.S.C. 1623(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor shall be compelled in any criminal case to be a witness against himself * * *.

18 U.S.C. 1623 provides:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States.
>
> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.
>
> In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.
>
> (d) Where, in the same continuous court or grand jury proceeding in which a declaration is

made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT

1. On June 16, 1976, petitioner testified before a federal grand jury under a grant of immunity (see 18 U.S.C. 6002). The grand jury was investigating illegal drug activity at the Colorado State Penitentiary, where petitioner had been confined (Tr. 48-51). Petitioner's testimony implicated a fellow inmate, Phillip Musgrave, in various drug-related offenses at the penitentiary. Specifically, petitioner testified that he obtained drugs in the penitentiary from Musgrave (A. 27); that he made telephone calls to one of Musgrave's girl friends and gave her coded messages concerning Musgrave's drug activities (A. 29-30); and that Musgrave subsequently gave him a list of chemicals used to manufacture methamphetamine, a controlled substance, and asked him to obtain the chemicals for him (A. 32; Tr. 53). Following petitioner's testimony, the grand jury indicted Musgrave and others on felony charges of conspiring to manufacture and distribute methamphetamine (Tr. 45, 54).

Approximately three months later, on September 30, 1976, petitioner went to the office of Michael Canges, Musgrave's attorney, where he gave a statement under oath in which he recanted his grand jury testimony implicating Musgrave (A. 33-42). He testified at that time that Musgrave had never given him drugs in the penitentiary (A. 37); that he had not

given Musgrave's girl friend any telephone messages regarding Musgrave's drug activities (A. 38); and that Musgrave had never given him a list of chemicals to obtain for any purpose (A. 39). Musgrave's attorney filed a transcript of petitioner's statement in the district court where Musgrave's prosecution was pending and moved to dismiss the indictment, alleging that it was based on perjured testimony (Tr. 56). The statement was entitled an "affidavit," although it was submitted to the court in transcript form (*ibid.*).

On October 21, 1976, an evidentiary hearing on Musgrave's motion was held in the district court. Petitioner testified at the hearing and adopted the sworn statement he had given at Canges' office. On examination by Canges, petitioner testified as follows (A. 46):

Q. At that time did I ask you certain questions and did you make certain answers to those questions?

A. Yes, sir, I did.

Q. And at that time did you tell the truth, the whole truth, and nothing but the truth?

A. I did, sir.

Q. Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A. Yes, sir, all but about the last five or ten pages.

Q. And referring to that affidavit—

MR. CANGES: For the record, that would be the affidavit that was tendered to this Court, a copy of which has been tendered to both the United States and to co-counsel.

Q. Mr. Dunn, with reference to that affidavit, and now having had the occasion to again review it, are the contents of that affidavit true?

A. Yes, sir.

Q. With reference to your testimony before the grand jury, as I understand it, your testimony encompassed acts over a period of some several years with reference to certain statements that you made concerning alleged distribution of methamphetamines on behalf of Mr. Musgrave and other co-defendants, am I correct?

A. Yes, sir.

Q. Was what you told the grand jury true?

A. No, sir.

Q. Was any part of it true?

A. Possibly ten percent.

This testimony was volunteered by petitioner, who had received no grant of immunity with respect to any statement he made at the hearing.

As a result of petitioner's sworn statement and his testimony at the evidentiary hearing, the government reduced the charges against Musgrave to possession of methamphetamine, a misdemeanor (see 21 U.S.C.

844) (Tr. 76-77). Musgrave agreed to plead guilty to that charge (*ibid.*).

2. Petitioner was then indicted in the United States District Court for the District of Colorado for making false declarations in a proceeding before or ancillary to a grand jury or a court, in violation of 18 U.S.C. 1623 (A. 3-11). The indictment charged that his testimony before the grand jury was inconsistent with various statements he had made "on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, * * * to the degree that one of said declarations was false and known by him to be false when made" (A. 4). In response to petitioner's motion for a bill of particulars, the government indicated it would rely on the inconsistent statements theory authorized by subsection (c) of Section 1623 in proving its case (A. 17-18). The government's reliance on the inconsistent statements theory was also made clear to the trial court and to the jury (A. 56-58). At trial the government introduced the relevant portions of petitioner's grand jury testimony, his sworn statement to Musgrave's attorney, and his testimony at the evidentiary hearing (A. 72).

Petitioner objected to the introduction of his grand jury testimony on the ground that the use of that testimony would violate the grant of immunity that he had been given prior to testifying before the grand jury (Tr. 41). He objected also to the introduction of the transcript of the October 21 evidentiary hearing on various grounds including relevance (Tr. 81). The court overruled both objections (Tr. 41, 86).

At the close of the government's case, petitioner moved for judgment of acquittal on all counts, again arguing that his testimony before the grand jury could not be used to establish the *corpus delicti* of a false declarations prosecution (Tr. 96). He also moved for judgment of acquittal on the ground that the September 30 statement in Canges' office was not made in a proceeding ancillary to or before a federal court or grand jury (Tr. 97). The court denied the motion, ruling that petitioner's grand jury testimony could properly be used to prove perjury (Tr. 107) and that the September 30 statement was made in a proceeding ancillary to a grand jury, at least as of the time he reaffirmed that statement at the October 21 hearing in district court (Tr. 108-109).

In summation, petitioner's counsel argued to the jury that although the September 30 statement was made under oath, it was not made in a proceeding ancillary to a grand jury, but instead was merely "a statement made to a private attorney that had some bearing on this case" (Tr. 151). The prosecutor responded that the September 30 statement was made in a proceeding ancillary to a court because it was made in connection with the Musgrave prosecution and because it was made the subject of the October 21 evidentiary hearing in district court (Tr. 167).

The court instructed the jury that it had to find that petitioner's declarations were made in a proceeding before or ancillary to a court (Tr. 179). The

court, however, was not requested by either party to define those terms, and it did not do so.[1] The jury returned a verdict of guilty on three of the five counts in the indictment (A. 72). Petitioner was sentenced to concurrent five-year terms of imprisonment on each count (S. Tr. 19).[2]

3. On appeal, petitioner contended that the sworn recantation given in Canges' office could not form the basis for a false declarations prosecution under 18 U.S.C. 1623, and that, in any event, the prosecution could not use petitioner's immunized grand jury testimony in a false declarations prosecution based upon an inconsistent statements theory.

As to the first contention, the court of appeals agreed with petitioner that his sworn statement in Canges' office on September 30, 1976, was not a statement "in any proceeding before or ancillary to any court or grand jury" within the meaning of Section 1623 (A. 75). Nevertheless, the court held that petitioner's subsequent affirmation of the recantation during the hearing on Musgrave's motion to dismiss on October 21, 1976, could sustain the prosecution. Al-

[1] Petitioner objected to the court's use of the phrase "in any proceeding before or ancillary to a court or jury," but only because it suggested that the jury "may select certain statements which may have been made in a proceeding ancillary to or before a U.S. Court or grand jury proceeding, and suggests that not all statements or declarations need to be made in any such proceeding" (Tr. 116-117).

[2] "S. Tr." refers to the transcript of the sentencing hearing on May 23, 1977. It is identified as Volume V of the record in the court of appeals.

though the indictment specified September 30 as the date of the ancillary proceeding rather than October 21, the court of appeals concluded that this discrepancy constituted simply a variance between the indictment and the proof at trial. The variance was not fatal in this case, the court held, because petitioner's testimony in the October 21 hearing was "inextricably related" to his September 30 statement (A. 76), and he could have anticipated that the evidence of his testimony at the October 21 hearing would be presented against him at trial (*ibid.*).

As to the second contention, the court of appeals held that it was not error for the government to use petitioner's immunized grand jury testimony against him. The court stated that although truthful testimony given under immunity cannot be used to incriminate the witness for crimes about which he testifies, perjured testimony is not protected by the grant of immunity and may be used to prove the witness's perjury or false declarations (A. 77-78). The court also accepted the proposition that immunized testimony may not be used to establish the *corpus delicti* of an inconsistent declarations prosecution without a prior showing that the immunized testimony is false (A. 79). The court found, however, that petitioner's "subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only [was] inconsistent with his immunized grand jury testimony, but, significantly, *contained [petitioner's] admission that he had in fact testified falsely before the grand jury*" (*ibid.*; emphasis in original).

The court concluded that petitioner's "unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the *corpus delicti* of the present prosecution" (A. 80). Petitioner had "grossly abused" the grant of immunity, the court reasoned, and his recantation "in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury" (*ibid.*, citing *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 349-350 (1963)).

SUMMARY OF ARGUMENT

It is clear in this case that petitioner lied under oath, either before the grand jury or in his September 30 statement. It is also clear that his false testimony has adversely affected the administration of justice, either by falsely accusing Musgrave before the grand jury or by falsely exonerating him in a manner that resulted in a substantial reduction of the charges against him. Petitioner contends, however, that his conviction for false swearing should be overturned because his September 30 statement was not made in a proceeding covered by the false declarations statute and because his immunized grand jury testimony was improperly used to prove that he lied, either before the grand jury or in his subsequent statement on September 30.

I.

1. The false declarations statute, 18 U.S.C. 1623, proscribes the making of false statements under oath "before or ancillary to any court or grand jury." A violation of the statute can be established without the need to prove that a particular statement is false if the prosecution can show that the defendant made at least two sworn statements that are so clearly inconsistent that at least one of them must be false. See 18 U.S.C. 1623(c). The government in this case charged and proved that petitioner's testimony before the grand jury was irreconcilably inconsistent with his September 30 statement. Petitioner's grand jury testimony was clearly covered by the statute. The first question presented by the case is whether his September 30 statement was also within the reach of the statute.

Petitioner's September 30 statement was a sworn statement taken by Musgrave's lawyer in connection with the criminal action against Musgrave, whom petitioner had implicated before the grand jury. The statement was submitted in the form of an affidavit to the district court in support of a motion to dismiss the indictment against Musgrave. Petitioner subsequently testified in an evidentiary hearing on the motion to dismiss, and he affirmed the truth of his September 30 statement at that time.

Section 1623 does not define the term "proceeding * * * ancillary to any court," but the legislative history of the statute suggests that the term was

included in the statute to bring within the reach of the statute statements such as affidavits, depositions, and certificates prepared for use in connection with a court proceeding. The September 30 proceeding clearly fit within that description. Petitioner's statement was taken in connection with the criminal proceeding against Musgrave and for use in that proceeding, a use in which petitioner actively participated by testifying at the October 21 evidentiary hearing and reaffirming the truth of his sworn statement. Accordingly, petitioner's September 30 statement was made in a proceeding ancillary to a court.

2. We do not agree with the court of appeals that if the September 30 statement was not made in a proceeding ancillary to a court, petitioner's conviction can nonetheless be affirmed. The court of appeals noted that the October 21 hearing was indisputably a proceeding "before * * * a court" within the meaning of Section 1623 and that petitioner's adoption of the September 30 statement at that time subjected him to prosecution for making inconsistent declarations before the grand jury and at the October 21 hearing. From that premise, the court concluded that there was simply a non-prejudicial variance in this case between the charge in the indictment and the proof at trial. In our view, this case presents neither a variance nor, as petitioner contends, an impermissible amendment of the indictment, because the charge in the indictment, the government's theory at trial, and the jury's verdict were all based on an inconsistency

between petitioner's grand jury testimony and his September 30 statement. The fact that the proof also showed that petitioner made an inconsistent statement at the evidentiary hearing on October 21 cannot support his conviction, however, since the conviction was not based on that charge. Therefore, if the Court disagrees with our contention that the September 30 statement was made in a proceeding ancillary to a court, we submit that petitioner's conviction cannot be upheld on the ground employed by the court of appeals.

II.

We also disagree with the court of appeals in its analysis (although not its disposition) of the second question presented by this case: whether petitioner's immunized grand jury testimony was properly used to prove that he lied under oath, either before the grand jury or subsequently in his September 30 sworn statement. The court of appeals held that because petitioner had stated that his grand jury testimony was false, it could be used under the theory that false immunized testimony is unprotected and may be used for any purpose. The problem with this analysis is that under the inconsistent declarations theory of proof used at trial, a conviction could have rested on a finding that petitioner's grand jury testimony was true and his subsequent sworn statement false. The grand jury testimony was therefore not used for its falsity, and the jury's verdict did not establish that it was false. For that reason, petitioner's conviction can stand only if his grand jury testi-

mony could properly be used at trial even if it were truthful.

1. It is our basic submission that the scope of the immunity acquired when a witness is compelled to testify over a claim of privilege is precisely ~~coexist-ent~~ coextensive with the scope of the privilege. Since the privilege did not entitle petitioner to refuse to testify on the ground that truthful testimony might be used against him in the event he subsequently decided to give false, inconsistent testimony, he acquired no immunity from such use of his compelled testimony.

After a valid claim of the privilege against compulsory self-incrimination, the government can compel a witness to testify by granting him immunity. In order to supplant the privilege, the immunity granted must be as broad as the privilege it displaces, but it need not be any broader. It is therefore necessary to determine the scope of the privilege at the time the witness's testimony is compelled in order to determine the scope of the immunity that is conferred.

The privilege protects a witness against being compelled to give testimony that subjects him to real and substantial risks of incrimination; it does not protect him against risks that are speculative or remote. In particular, the privilege ordinarily does not protect against the danger of incrimination for crimes the witness may choose to commit in the future. In this case, petitioner's privilege against compulsory self-incrimination entitled him to refuse to testify about the drug offenses that the grand jury was investigating until he was given a grant of immunity in

exchange for his testimony. Similarly, if petitioner had previously given a false sworn statement about the matters that were the subject of the grand jury questioning, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would generate evidence that could be used against him in a prosecution for false swearing on the prior occasion. But if he had asserted his privilege on the ground that his grand jury testimony would be incriminating if he should later choose to give materially inconsistent testimony, his claim would not have been upheld. The use of the privilege in that context would serve simply to give the witness increased freedom to perjure himself in the future, an interest the privilege plainly was not designed to protect.

Because petitioner could not have made a valid assertion of the privilege with respect to a possible future act of false swearing, the immunity he was granted to displace the privilege does not protect him from the use of his testimony to prove that he made a false declaration, either before the grand jury or in a subsequent sworn statement. The Fifth Amendment therefore does not prohibit the use of petitioner's immunized grand jury testimony to prove the false declarations offense charged in this case.

2. The federal immunity statute, 18 U.S.C. 6002, does not prohibit the use of petitioner's grand jury testimony in this case. The statute, by its terms, permits the use of immunized testimony in any prosecution for "perjury" or "giving a false statement,"

the latter of which plainly includes prosecutions for false declarations before a grand jury or a court. Petitioner's contention that the statute should be construed to exclude false declarations prosecutions based on the inconsistent declarations theory of proof is unsupported either by the language of the statute or its legislative history.

Petitioner argues that the language of the statute suggests a congressional intention to prohibit the use of immunized testimony in all cases except those in which the witness is charged with lying in the course of his immunized testimony or with violating the immunity order. The legislative history of the immunity statute, however, clearly shows that it was designed to confine the scope of the immunity to that required by the Constitution, and no more. The legislative materials further show that the statutory language on which petitioner relies was included not to limit the uses of immunized testimony more strictly than the Constitution permits, but simply out of caution, so that the statute would not be construed to prohibit the use of immunized testimony for the listed purposes.

The same policies that underlie the "perjury" exception to the use immunity statute apply as well to the use of immunized testimony in inconsistent declarations prosecutions. Perjury under a grant of immunity renders the compelled testimony worthless to the grand jury, and barring the government from using a witness's immunized testimony to prove that it is false would permit grand jury witnesses to lie

with impunity and thus to undercut the investigative function of the grand jury. Similarly, when a witness repudiates his grand jury testimony under oath he impairs the value of his testimony and subverts the grand jury's investigative efforts. Yet under petitioner's argument, unless the government has some reliable way of proving which of the two statements is false, a witness is free to repudiate his immunized grand jury testimony with impunity. We submit that neither the immunity statute nor the Fifth Amendment compels that unpalatable result.

ARGUMENT

I.

THE PROOF ESTABLISHED, AND PETITIONER WAS CONVICTED OF, THE OFFENSE CHARGED IN THE INDICTMENT

A. The September 30 "Canges Statement" Was Made in a Proceeding Ancillary to a Court

Section 1623 of the Criminal Code makes it an offense for a person knowingly to make a false material declaration under oath in any proceeding before or ancillary to any court or grand jury of the United States. Subsection (c) of Section 1623 provides that a violation of the statute can be established by proof that, in any proceeding before or ancillary to a court or grand jury, the defendant has made two or more declarations that are inconsistent to the degree that at least one of them is necessarily false. The government used this "inconsistent declarations" method of

proof in establishing a violation of Section 1623 in this case.

With respect to each count, the indictment charged that petitioner's grand jury testimony and his sworn statement of September 30, 1976, were inconsistent. Prior to trial the government made it clear to the court and defense counsel that it intended to rely on the inconsistent declarations method of proof permitted by Section 1623(c) to show that with respect to each count in the indictment at least one of the two conflicting sworn statements was false. The court properly charged the jury on the inconsistent declarations theory that the government relied upon.

Petitioner contends (Br. 10-13) that his September 30 sworn statement was not made in a "proceeding * * * ancillary to a court" and that the testimony he gave at that time therefore cannot supply a part of the *corpus delicti* of the false statements offense. Thus, petitioner argues, the indictment failed to charge an offense under Section 1623, at least in the absence of proof that it was his grand jury testimony, rather than his testimony at the September 30 proceeding, that was false.

The term "proceeding * * * ancillary to any court or grand jury" is not defined in Section 1623 or elsewhere in the Criminal Code. Nor had it been construed in any appellate court decision prior to this case. But the legislative history of the provision, the experience under the federal perjury statute, 18 U.S.C. 1621, and the few court decisions touching on the issue support the proposition that sworn state-

ments prepared outside the court are within the reach of Section 1623 if the sworn statements are prepared for the purpose of submission to the court or grand jury.

The purpose of the false declaration statute, like the purpose of the federal perjury statute, is to protect courts and grand juries from the contamination of false swearing.[3] See *Bronston* v. *United States*, 409 U.S. 352, 357 (1973); *United States* v. *Williams*, 341 U.S. 58, 68 (1951); S. Rep. No. 91-617, 91st Cong., 1st Sess. 58-59 (1969). False swearing in an affidavit that is submitted to a court subjects the court to the same abuse as false testimony in open court, since a court often relies on sworn documentary evidence in the same fashion that it relies on sworn testimony.

For that reason, it is clear that false swearing in an affidavit authorized to be filed in a judicial proceeding violates Section 1621. See, *e.g.*, *United States* v. *D'Amato*, 507 F.2d 26, 29 (2d Cir. 1974); *United States* v. *Birrell*, 470 F.2d 113 (2d Cir. 1972); *Ely Valley Mines, Inc.* v. *Lee*, 385 F.2d 188 (9th Cir. 1967); *Butler* v. *McKey*, 138 F.2d 373 (9th Cir. 1943), cert. denied, 321 U.S. 780 (1944). Thus, contrary to petitioner's assertion (Br. 12), he could

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[3] The federal perjury statute, 18 U.S.C. 1621, also serves to protect other entities from false swearing. See, *e.g.*, *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977) (Congress); *United States* v. *Kline*, 366 F. Supp. 994 (D.D.C. 1973) (SEC); *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp. 879 (D.D.C.), affirmed, 404 U.S. 802 (1971) (Postal Service).

have been prosecuted for perjury under Section 1621 for making the September 30 sworn statement, if the government had been able to prove that the contents of that statement were actually false rather than merely irreconcilably inconsistent with his grand jury testimony.[4]

False swearing in affidavits and other out-of-court statements has been held to violate Section 1623 as well. For example, in *United States* v. *Stassi*, 583 F.2d 122 (3d Cir. 1978), the defendant was convicted on a false declarations charge for making inconsistent declarations in a Rule 11 proceeding before a court and in a subsequent affidavit filed in support of his Section 2255 motion to vacate his sentence. The court of appeals had no difficulty finding that the Section 2255 affidavit constituted a statement in a proceeding "before or ancillary to" a court. As the court of appeals noted, "[a] false material declaration, knowingly made, in a § 2255 affidavit or hearing offends the administration of criminal justice as much as a

[4] Petitioner's September 30 statement was submitted to the court as an affidavit in support of Musgrave's motion to dismiss the indictment, as is authorized by Fed. R. Crim. P. 12(b)(4) and 47. His statement was taken under an oath given by an individual authorized by Colorado law to administer oaths (Tr. 24, 97; G. Ex. 2). And federal law permits persons so authorized by local law to administer oaths where the oath is authorized or required under the laws of the United States. 5 U.S.C. 2903(c)(2). Thus, the oath required for submission of the affidavit supporting Musgrave's motion to dismiss was taken "before a competent * * * person, in [a] case in which a law of the United States authorizes an oath to be administered," as is required by 18 U.S.C. 1621.

false material declaration made in any other 'proceeding before or ancillary to any court'" (*id.* at 127). Similarly, in *United States* v. *Krogh*, 366 F. Supp. 1255, 1256 (D.D.C. 1973), the district court held that a sworn deposition taken in an office in the Department of Justice was "a proceeding ancillary to the Watergate Grand Jury inquiry" because it was intended as a substitute for the defendant's testimony and was in fact subsequently read to the grand jury in lieu of live testimony by the defendant.

The practice of submitting sworn statements to a grand jury or in a court proceeding in place of or in addition to live testimony is, of course, a common one and one that is essential in many circumstances to the efficient disposition of the business of courts and grand juries. It would defeat the purposes of Section 1623 if an individual could escape the sanctions of that statute simply by submitting his false sworn statements to a court or a grand jury in documentary form rather than through live testimony. In order to guarantee that the penalties of perjury or giving false declarations would be available in such cases, the parties would have to call the declarant to the stand to reaffirm or repeat his sworn statement, thus wholly undercutting the advantages of proceeding on sworn statements taken other than in open court. Accordingly, Section 1623 is properly construed to reach not only sworn statements made before a court, but also sworn statements made outside the court for submission to the court in connection with a pending

court proceeding, *i.e.*, sworn statements made in proceedings "ancillary to [a] court."

The legislative history of Section 1623 confirms this interpretation of the statute. Section 1623 was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 932-933. The bill, as initially introduced, early in 1969, contained a version of Section 1623 that would have reached only those false statements made "in any trial, hearing, or proceeding before any court or grand jury." S. 30, 91st Cong., 1st Sess. 12 (1969), reprinted in *Measures Relating to Organized Crime: Hearings on S. 30, etc. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 15 (1969) (hereafter "*Senate Hearings*"). The Department of Justice was asked for its comments on the bill, and among the comments was a criticism that the language of proposed Section 1623 was too narrow. The Department pointed out that, as drafted, proposed Section 1623 "is not as inclusive as the present Federal perjury statute in that [it] is limited specifically to 'any trial, hearing, or proceeding before any court or grand jury' and thus not only are pretrial depositions, affidavits, and certificates excluded but also administrative and legislative hearings or proceedings." *Senate Hearings*, *supra*, at 372, 379-380. See also S. Rep. No. 91-617, 91st Cong., 1st Sess. 110-111 (1969). In his testimony before the Committee, Assistant Attorney General Will Wilson summarized this point by stating, "[w]e favor including other testimony, preliminary testimony and other

statements, in the perjury field" (*Senate Hearings*, *supra*, at 389).

Senator McClellan, on behalf of the Subcommittee, responded shortly after Mr. Wilson's testimony with a letter noting the Justice Department's criticism of the limited scope of Section 1623 and proposing a change in the language of that Section to solve that problem. Senator McClellan wrote (*Senate Hearings*, *supra*, at 409):

> You also read Title IV not to cover "pre-trial depositions, affidavits and certifications." This was not our intent in drafting the bill. We had hoped that it would be applicable, for example, to situations such as [the] kind of pre-trial depositions that the enforcement of S. 1861 would present. If we included in the statute the phrase "proceedings before or ancillary to any court or grand jury" do you feel that this intent would be adequately expressed?

In response, the Department of Justice agreed that the inclusion of the proposed language would have the effect that the Committee intended. *Senate Hearings*, *supra*, at 411.[5]

The committee reports embody this understanding and reflect that by covering proceedings "ancillary to" a court or grand jury, Congress intended to include, for example, pretrial deposition hearings. See

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[5] The "pre-trial depositions" mentioned in Senator McClellan's letter apparently referred to depositions for use in civil proceedings under 18 U.S.C. 1962, which were proposed as part of S. 1861, 91st Cong., 1st Sess. (1969).

S. Rep. No. 91-617, *supra*, at 145, 149; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). The reference to pretrial depositions in the committee reports was not meant to be exhaustive; in both reports pretrial depositions were listed as only an example of the kind of ancillary proceedings that were meant to be included. In light of the statement in Senator McClellan's letter that it was the intent of the Committee in drafting the bill to cover "affidavits and certifications" as well as pretrial depositions, and in light of the adoption of statutory language designed to cover those situations, it is proper to include within the reach of the statute affidavits or sworn statements such as that given by petitioner on September 30.

If there were any doubt that petitioner's September 30 sworn statement was made in a proceeding that was ancillary to a court, that doubt is dispelled by the fact that the statement was submitted to the court with petitioner's knowledge and that petitioner specifically reaffirmed the statement under oath at the October 21 hearing. Thus, even if the September 30 proceeding could be said to be independent of the Musgrave criminal action as of September 30, it plainly became ancillary to a court when the statement was introduced and adopted by petitioner in open court (with the consequence that the felony charges against Musgrave had to be reduced to one misdemeanor count). The indictment therefore properly charged petitioner with having made one of his two inconsistent declarations in the September 30 sworn statement.

B. Petitioner's Conviction Cannot Be Sustained on the Theory that it Was the Product of a Non-prejudicial Variance

The court of appeals held that even though, in its view, the September 30 statement was not made in a proceeding ancillary to a court, petitioner's conviction should nonetheless be affirmed. The court concluded that because the October 21 hearing was held before a court and thus was clearly within the ambit of 18 U.S.C. 1623, and because petitioner adopted his September 30 statement at that hearing, the disparity between the charge in the indictment and the proof at trial that would have supported a conviction was merely a "variance." The variance was tolerable in this case, the court further concluded, because it did not prejudice petitioner. Moreover, because "it cannot be said that Dunn could not have anticipated that [the evidence of the October 21 hearing] would be presented against him at his perjury trial," the court held that the failure of the indictment to refer to that hearing did not render the indictment insufficient (A. 76).

We disagree with the court of appeals that petitioner's conviction can be affirmed if the Court concludes that the September 30 statement was not made in a proceeding ancillary to a court. Yet while we agree with petitioner that the conviction cannot be sustained on the ground set out by the court of appeals, we reach that conclusion by a different route. Petitioner argues (Br. 13-19) that the

court of appeals both amended the indictment and sanctioned a fatal variance between the charges in the indictment and the proof at trial. But the infirmity in the court's ruling does not fall comfortably within either of these categories. Instead, as we view the case, after the court of appeals concluded that the September 30 statement was not made in a proceeding ancillary to a court, it improperly held that petitioner could be convicted of a charge that was neither alleged in the indictment nor submitted to the jury.

1. *The indictment was not amended*

An indictment is amended when the court or the prosecutor makes a change in the language of the indictment. Amending indictments was strictly prohibited at common law, see *Ex parte Bain*, 121 U.S. 1 (1887), and even today it is generally said that an indictment may be amended only as to matters of form, see *Russell* v. *United States*, 369 U.S. 749, 770 (1962). The purpose of the rule against amending indictments is to protect the defendant's Fifth Amendment right to be indicted by a grand jury. If the indictment is materially amended, the defendant is forced to trial on charges different from those returned by the grand jury, which in effect permits him to be tried on an indictment brought by the prosecutor rather than by the grand jury. See *Stirone* v. *United States*, 361 U.S. 212, 217 (1960).

When a court submits a case to the jury on a theory different from that set out in the indictment, the effect of the court's action may be treated as a constructive amendment to the indictment, even though there is no formal change in the indictment's language. In such cases, the reviewing court must inquire whether the theory on which the case was submitted to the jury differed with respect to an essential element of the offense and in a manner not fairly comprised within the charge returned by the grand jury. *Stirone* v. *United States*, *supra*, 361 U.S. at 218-219.[6]

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[6] Although the Court stated in *Stirone* (361 U.S. at 217) that the strict prohibition against amendments to indictments, as set forth in *Ex parte Bain*, *supra*, has never been disapproved, it is plain that the rule is no longer as rigid as it was at common law. The courts uniformly permit indictments to be amended when the effect of the amendment is to withdraw one or more of the charges from the jury or otherwise to narrow the charges against the defendant. See *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Prior*, 546 F.2d 1254, 1257 (5th Cir. 1977); *United States* v. *Holt*, 529 F.2d 981 (4th Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), cert. denied, 423 U.S. 855 (1975). See 8 *Moore's Federal Practice* ¶ 7.05 [3] (2d ed. 1978).

In addition, although with less uniformity, courts have sanctioned amendments or "constructive amendments" to indictments to remove surplusage, including allegations that require the government to prove more than is required under the statute at issue. See *United States* v. *Cirami*, *supra*; *United States* v. *McCrane*, 527 F.2d 906, 912-913 (3d Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Harvey*, 428 F.2d 782 (9th Cir. 1970). Courts have also permitted amendments to alter the date of the offense, *Stewart*

In this case, the indictment was not amended at any point in the proceedings. Petitioner was tried and convicted on the same charges that were returned by the grand jury. Neither the prosecutor nor the court in any way altered those charges before trial or before verdict, and the jury was properly instructed wholly in accordance with the allegations in the indictment. It is therefore incorrect to state that the error committed by the court of appeals was to "amend" the indictment, since the objection to amending an indictment is that the charge as submitted to the petit jury is different from the charge as returned by the grand jury. If the fact-finder is given the case on the basis of the original indictment, as here, there is no fatal "amendment." See *Heisler* v. *United States*, 394 F.2d 692, 696 (9th Cir. 1968).

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v. *United States*, 395 F.2d 484, 487-489 (8th Cir. 1968); the serial number of a gun, *United States* v. *Neff*, 525 F.2d 361, 363 (8th Cir. 1975); the nature of the proceeding at which the defendant was alleged to have obstructed justice, *United States* v. *Fruchtman*, 421 F.2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970); and the name of the defendant, *United States* v. *Denny*, 165 F.2d 668 (7th Cir. 1947), cert. denied, 333 U.S. 844 (1948). But see *United States* v. *Huff*, 512 F.2d 66, 69 (5th Cir. 1975) (technical error in name of drug cannot be cured by amendment); *United States* v. *Critchley*, 353 F.2d 358 (3d Cir. 1965) (permitting government to prove offense occurred on a different day from that alleged in the indictment constitutes impermissible amendment). None of these amendments or "constructive amendments" would have been permitted at common law. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1174-1176 (1960).

2. *There was no variance between the charges in the indictment and the proof at trial*

A variance arises when the evidence offered at trial proves facts different from those alleged in the indictment. *Berger* v. *United States*, 295 U.S. 78, 81 (1935); *Gaither* v. *United States*, 413 F.2d 1061, 1071-1072 (D.C. Cir. 1969). Unlike an amendment of the indictment, which is reversible error except in limited circumstances, a variance is subject to the application of the harmless error rule, Fed. R. Crim. P. 52(a), and thus results in reversal only if it affects the defendant's substantial rights. *Berger* v. *United States*, *supra*, 295 U.S. at 82: *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *United States* v. *Schrenzel*, 462 F.2d 765 (8th Cir.), cert. denied, 409 U.S. 984 (1972); *United States* v. *Antonelli*, 439 F.2d 1068 (1st Cir. 1971); *United States* v. *Evans*, 398 F.2d 159 (3d Cir. 1968).[7]

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[7] The traditional distinction between variances and amendments has caused great confusion, as a number of courts have observed. See, *e.g.*, *United States* v. *Dawson*, 516 F.2d 796, 801-804 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *Heisler* v. *United States*, 394 F.2d 692, 695-696 (9th Cir. 1968) ("the progeny of *Bain* are out of joint"). In an appropriate case, we believe that this Court should reconsider these doctrines and the principles governing their application.

Amendments are said to offend the interest in ensuring that a defendant is tried for the offense with which the grand jury charged him, while variances are assessed in light of the concern that the defendant not be subject to unfair surprise or to the possibility of further prosecution for the same offense. However, the first two interests are implicated by both

Petitioner argues (Br. 18) that there was a fatal variance in this case between the charge and the proof. The trial court permitted a variance, he contends, when it admitted evidence relating to the October 21 evidentiary hearing, and the court of appeals "committed a prejudicial variance in looking to the

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amendments and variances, since each involves a disparity between the charges returned by the grand jury and the proof introduced at trial. The third interest does not seem significantly implicated by either amendments or variances, since the entire record of a proceeding is referred to in determining whether a defendant is being placed twice in jeopardy for the same offense. See *Russell* v. *United States*, *supra*, 369 U.S. at 764; *Bartell* v. *United States*, 227 U.S. 427, 433 (1913); *Dunbar* v. *United States*, 156 U.S. 185, 191 (1895).

In light of the substantial conceptual overlap between amendments and variances and the congruity of the interests protected by the two doctrines, it is difficult to understand why the standards for reversal should be different, depending upon whether a particular case is characterized as presenting an amendment or a variance. If anything, amendments should be the preferred course for countenancing a disparity between the proof at trial and the charge brought by the grand jury, since an amendment at least gives advance notice of the disparity. Yet under the present state of the law, amendments are judged more strictly: an amendment, actual or "constructive" (*i.e.*, charging the jury in terms different from those in the indictment), is cause for automatic reversal, unless the amendment falls within one of the several narrow exceptions to the strict prohibition set down in *Ex parte Bain*, *supra*; a variance is cause for reversal only if it affects the defendant's substantial rights. See *Berger* v. *United States*, *supra*. In our view, both doctrines should be subject to the same analysis to determine whether the error is prejudicial or harmless and whether there is such a departure from the charge returned by the grand jury as to constitute a substantial abrogation of the Fifth Amendment right to indictment.

[October 21 hearing] in concluding that Dunn had 'admitted he lied to the grand jury'" (Br. 19).

There is no question that the evidence of the October 21 hearing was properly admitted at trial. It was admissible under any theory of the case to show that the September 30 statements were not the product of any mistake or inadvertence and that petitioner knew his testimony before the grand jury and in the September 30 statement were inconsistent (see Tr. 86-87). Moreover, under our interpretation of the statute, which was adopted by the trial court, the evidence of the October 21 hearing was admissible to show that when petitioner adopted his September 30 statement at that hearing, the September 30 proceeding became "ancillary to [a] court" for the purposes of Section 1623(c). For neither purpose was it necessary specifically to allege or refer to the October 21 hearing in the indictment.

The indictment was sufficient for purposes of Fed. R. Crim. P. 7(c) because it alleged all the elements of the offense with which petitioner was charged and in particular specified that the September 30 statement was made in a proceeding ancillary to a court. It was not necessary for the indictment further to allege the legal theory under which the government would assert that the September statement was ancillary to a court or the evidence that the government would adduce to show that petitioner knew his sworn statements were inconsistent. See *Hamling* v. *United States*, 418 U.S. 87, 117-118 (1974); *Giordanello* v. *United States*, 357 U.S. 480,

483 (1958); *United States* v. *Debrow*, 346 U.S. 374, 377-378 (1953); *United States* v. *Gibson*, 513 F.2d 978, 979 (6th Cir. 1976); *United States* v. *Addonizio*, 451 F.2d 49, 58-59 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972).

In short, there was no variance at trial because the evidence proved precisely what was alleged in the indictment. Rather, what the court of appeals did was to reject the legal sufficiency of the charges as alleged in the indictment and proved at trial, but then to uphold petitioner's conviction on a different theory—one that was not alleged in the indictment or presented to the petit jury. If petitioner had been charged with making inconsistent statements before the grand jury and before a court on October 21, the evidence at trial would have supported a jury verdict against him. But that was not the charge on which he was tried. Thus, while the court of appeals' affirmance of petitioner's conviction on that theory does not constitute an amendment of the indictment or a variance in the proof, it does offend the principle that an appellate court cannot affirm a defendant's conviction on charges of which the jury did not find him guilty. See *Cole* v. *Arkansas*, 333 U.S. 196 (1948). See also *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 (1974); *Garner* v. *Louisiana*, 368 U.S. 157, 163-164 (1961); *De Jonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

To be sure, in this case the difference between the theory on which the indictment was based and the theory

on which the court of appeals affirmed the conviction is a purely technical one. The evidence introduced at trial would support a conviction on either theory, and it is inconceivable that the jury's verdict would have been any different if it had been asked to determine whether his statement on October 21, adopting his September 30 statement, was inconsistent with his grand jury testimony, instead of being asked to determine whether his September 30 statement itself was inconsistent with his grand jury testimony. Nonetheless, if the court of appeals is correct that petitioner's September 30 statement was not made in a proceeding ancillary to a court, we believe that petitioner must be given an opportunity to contest his guilt of the different charges of making inconsistent statements before the grand jury and on October 21, no matter how confident the court of appeals may be that the jury would come to the same result in that case.

We emphasize, once again, that we disagree with the court of appeals' conclusion that petitioner's September 30 statement was not made in a proceeding ancillary to a court. But if the Court disagrees with us on that point, we believe that petitioner's conviction would have to be reversed.

II.

PETITIONER'S IMMUNIZED GRAND JURY TESTIMONY WAS PROPERLY INTRODUCED AGAINST HIM IN HIS FALSE DECLARATIONS PROSECUTION

The question of more general importance in this case is whether immunized testimony can be used in a false declarations prosecution for the purpose of showing its inconsistency with subsequent, non-immunized testimony. We note preliminarily that, even if the Court determines that petitioner's conviction must be reversed on the ground that the September 30 statement was not made in a proceeding ancillary to a court, petitioner will be subject to reindictment for making inconsistent statements before the grand jury and at the October 21 hearing.[8] Accordingly, we believe the Court should reach the second and more important question presented by

[8] Petitioner contended in his reply to our memorandum in response to his petition for certiorari (Rep. Br. 3) that his October 21 testimony was not inconsistent with his grand jury testimony and that it therefore could not support a prosecution under 18 U.S.C. 1623(c). He has not made that argument in his brief on the merits, but in any event the contention is incorrect. As is reflected in the portion of the October 21 hearing quoted at pages 6-7, *supra*, petitioner took the stand specifically to affirm the truth of his September 30 statement. It would be pointless, as well as contrary to the purpose of the prohibitions against false swearing, to require that petitioner repeat from the stand each of the declarations in the statement he had just affirmed in order to subject him to a perjury or false declarations prosecution for making those declarations in a proceeding before a court.

this case regardless of how it resolves the first question.

In this case, petitioner was compelled to testify before a federal grand jury on the subject of illicit drug dealings in the Colorado prison system. He plainly had sufficient exposure to possible prosecution for those criminal activities to justify invoking his Fifth Amendment privilege and refusing to testify about them. Petitioner testified only after being immunized against the use of his testimony to incriminate him, and, as we discuss below (pages 39-41, *infra*), the posture of this case is such that petitioner must be given the benefit of the assumption that his compelled testimony was truthful.

No one disputes that the immunity petitioner obtained in return for his compelled testimony precludes the government from making either direct or derivative use of that testimony to convict him of complicity in the drug offenses that were the subject of his testimony. The question here is whether he also acquired immunity from the use of that testimony to prove a later offense (here, perjury) that was neither imminent nor even contemplated at the time the privilege was invoked and the immunity conferred.

In the argument that follows, we contend that neither the Constitution nor the immunity statute, 18 U.S.C. 6002, prevents the use made in this case of petitioner's immunized testimony. This conclusion follows inevitably if the Court agrees with the following propositions:

(1) The scope of the immunity conferred in overriding an invocation of the privilege is precisely coextensive with the right of non-incrimination enjoyed by the witness at the time the testimony is compelled; and

(2) A witness may not properly invoke the privilege against compulsory self-incrimination to refuse to answer questions before a grand jury on the ground that he may subsequently decide to give contrary testimony and does not wish his grand jury testimony to be available as evidence of the falsity of that testimony.

We now turn to establishing the correctness of these two propositions.

A. The Fifth Amendment Permits the Use of Immunized Testimony to Prove the Falsity of Subsequent, Non-Immunized Testimony

1. *Introduction*

If this were an ordinary prosecution for perjury in which the issue was simply whether petitioner's testimony before the grand jury was false, there would be no doubt that his immunized grand jury testimony could be used against him. The Court has always permitted prosecutions for perjury committed under a grant of immunity, even when the immunity statute in question contains no express exception for perjury. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577-578 (1976) (plurality opinion);

id. at 584-585 (Brennan, J., concurring in the result); *id.* at 609 (Stewart, J., concurring in the result); *Glickstein* v. *United States*, 222 U.S. 139 (1911).[9]

This case is not governed by that settled principle, however, because of the method of proof used at trial. As we have noted, the government relied on the "inconsistent declarations" method of proving a false declarations offense. See 18 U.S.C. 1623(c). Under this method of proof, the government can establish a violation of the false declarations statute by showing that the defendant made two inconsistent sworn statements in proceedings before or ancillary to a grand jury or a court; there is no need to prove which of the two statements is false. The jury was properly instructed on this method of proof (A. 57-58), and it must be presumed that the verdict was based simply on the inconsistency between the grand jury testimony and the statements sworn to on September 30. Thus, unlike the situation in cases like *Glickstein*, the government was not using immunized testimony solely to prove its falsity, and the jury's verdict of guilty did not necessarily mean that the

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[9] It is less clear how much of the immunized testimony may be introduced in such a prosecution. At least those portions alleged to be false may be used. See *United States* v. *Anzalone*, 555 F.2d 317, 320 (2d Cir. 1977); *United States* v. *Patrick*, 542 F.2d 381, 385 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Hockenberry*, 474 F.2d 247, 249 (3d Cir. 1973) (en banc). The question whether other relevant portions may be used to prove that the charged portions are false is before the Court in *United States* v. *Apfelbaum*, petition for cert. pending, No. 78-972.

jury had concluded that petitioner's grand jury testimony was false.

For this reason, we disagree with the rationale employed by the court of appeals to sustain the use of petitioner's grand jury testimony. The court of appeals first noted, correctly, that a grant of immunity protects only truthful testimony. It then ruled that because petitioner had subsequently stated that his grand jury testimony was false, that admission provided a sufficient basis for applying the principle that false immunized testimony cannot be used against the witness (A. 79-80). We believe that this approach would ordinarily be appropriate in cases in which the prosecution seeks to use the immunized testimony only for its falsity. See *United States* v. *Moss*, 562 F.2d 155 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978); cf. *United States* v. *Kahan*, 415 U.S. 239 (1974); *United States* v. *Tramunti*, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). Here, however, the prosecution did not necessarily rest on the theory that petitioner's immunized grand jury testimony was false; the jury may well have concluded that the grand jury testimony was true and the subsequent recantation false, or that because the statements were irreconcilably inconsistent, it was unnecessary to determine which one was false. In view of those possibilities, petitioner's statement that his grand jury testimony was false does not, by itself, justify the use of that testimony against him.

In order to sustain the conviction in this case, it is necessary to conclude that petitioner's immunized grand jury testimony could be used against him even if it was truthful. Although we disclaim reliance on the rationale of the court of appeals, we nonetheless submit that it reached the correct result and that neither the Constitution nor the immunity statute bars the use of even truthful immunized testimony to establish a subsequent perjury.

2. *A grant of immunity must be as broad as, but need not be broader than, the privilege it displaces*

The Fifth Amendment privilege against compulsory self-incrimination protects a person against being compelled to testify when he reasonably believes his testimony could incriminate him. *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). The privilege is available only if the witness's answer to a particular question would expose him to a substantial and real danger of incrimination; if the testimony could not incriminate him, or if the threat of incrimination is merely speculative or remote, the privilege may not be invoked. See *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951); *Rogers* v. *United States*, 340 U.S. 367, 373-375 (1951); *Mason* v. *United States*, 244 U.S. 362, 365-367 (1917); *Heike* v. *United States*, 227 U.S. 131, 144 (1913); *Brown* v. *Walker*, 161 U.S. 591, 599-600 (1896).[10]

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[10] This standard is commonly traced to the English case of *Regina* v. *Boyles*, 121 Eng. Rep. 730, 738 (Q.B. 1861) (Cockburn, C. J.) ("the danger to be apprehended must be

Even when a witness makes a valid assertion of the privilege, he can be compelled to testify if the government grants him immunity in exchange for his testimony.[11] Testimony can constitutionally be compelled under a grant of immunity as long as the immunity removes the danger against which the privilege protects. In order to substitute for the privilege, the immunity must be co-extensive with the privilege that it supplants, but it need not be any broader. *Kastigar* v. *United States*, *supra*, 406 U.S. at 449, 453; *Murphy* v. *Waterfront Commission*, 378

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real and appreciable * * * not a danger of an imaginary and unsubstantial character"). See VIII J. Wigmore, *Evidence* § 2260 (McNaughton rev. 1961).

Moreover, the determination whether the risk of incrimination is sufficiently great to warrant the protection of the privilege is not left to the witness, but must be made by a court if the witness's invocation of the privilege is challenged. *United States* v. *Mandujano*, 425 U.S. 564, 575 (1976) (plurality opinion); *Hoffman* v. *United States*, *supra*, 341 U.S. at 486-487; *Mason* v. *United States*, *supra*, 244 U.S. at 366; *United States* v. *Burr*, 25 F. Cas. 38, 39-40 (C.C. Va. 1807) (No. 14,692e) (Marshall, C. J.); *In re Pillo*, 11 N.J. 8, 19-20, 22, 93 A.2d 176, 181-183 (1952) (Brennan, J.).

[11] Granting immunity has long been recognized as an appropriate means of accommodating the right of the public to demand every man's evidence and the right of the individual not to be forced to incriminate himself by his testimony. The historical background of immunity or "indemnity" statutes is traced in *Kastigar* v. *United States*, *supra*, 406 U.S. at 443-446. See also L. Levy, *Origins of the Fifth Amendment* 328-329, 384-404 (1968); VIII J. Wigmore, *Evidence*, *supra*, at § 2281; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568 (1963).

U.S. 52, 54, 78 (1964); *Brown* v. *Walker*, 161 U.S. 591, 595, 610 (1896).

3. *The privilege, and thus the immunity granted in its place, ordinarily does not extend to crimes the witness may commit in the future*

Because a witness is not entitled to assert his Fifth Amendment privilege with respect to speculative risks of incrimination, he ordinarily is not permitted to assert the privilege on the basis of crimes he might commit in the future. Thus, even if his testimony would provide the government with information that could prove useful in prosecuting him for offenses that he might commit after testifying, he ordinarily cannot refuse to testify on that ground. See *United States* v. *Freed*, 401 U.S. 601, 606-607 (1971); *id.* at 611-612 (Brennan, J., concurring); *United States* v. *Bryan*, 339 U.S. 323, 340-341 (1950); *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911); *United States* v. *Tramunti*, 500 F.2d 1334, 1344 (2d Cir. 1974).

In *Marchetti* v. *United States*, *supra*, the Court declined to apply a rigid distinction between past and future offenses in determining whether the privilege is available. The Court noted that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination" (390 U.S. at 54). Nonetheless, it declined to apply that general principle to the case of a professional gambler engaged in a continuing course of illegal conduct and faced with a registration scheme designed primarily for law enforcement purposes. In those circum-

stances, the Court concluded, the risk of incrimination with respect to future acts was sufficient to justify upholding the claim of privilege.[12]

The subsequent decision in *United States* v. *Freed*, *supra*, made it clear that the Court in *Marchetti* did not mean to discard the distinction between past and future crimes in testing the availability of privilege. To the contrary, the Court in *Freed* reaffirmed the past-future distinction and the principle that the privilege cannot be asserted to protect against incrimination for future crimes. *Freed* thus suggests that *Marchetti* may be limited to cases in which the privilege is asserted to avoid a substantial and nonspeculative risk of incrimination for future acts that are part of an ongoing criminal enterprise.[13]

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[12] The Court also upheld the claim of privilege on the ground that the registration and tax payment requirements at issue in the case posed substantial hazards of incrimination with respect to Marchetti's current and past activities, because "satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted" (390 U.S. at 52).

[13] The risk of incrimination in both *Freed* and the present case is vastly different both in kind and degree from the risk of incrimination facing Marchetti. The statute at issue in *Marchetti* required professional gamblers to acquire a federal gambling tax stamp, which in turn required "the declaration of a present intent to commence gambling activities" and thus obliged "even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes." 390 U.S. at 53. Petitioner's compelled grand jury testimony, by contrast, did not in any way require him to declare a present intent to commit perjury. Petitioner's grand jury testimony became incriminating evidence of a false declarations offense only when he later determined to give sworn testimony contrary to the testimony he gave before the grand jury. Thus, the compelled disclosure in *Marchetti* could help incriminate the registrant even if he never took steps to commit any further gambling offenses. Petitioner's grand jury testimony, by contrast, cannot realistically be said to have been incriminating with respect to its truth or falsity until the time that, by his own devices, he managed to make it so.

In *Freed*, the Court upheld the provision of the National Firearms Act that requires a detailed report to be filed upon the transfer of certain classes of firearms. The Act provides that the information furnished in the report could not be used against either party to the transfer with respect to any present or past criminal acts. The defendant argued that even though the information in the transfer registration forms could not be used to incriminate him for present or past acts, it could be used in connection with any unlawful acts he might commit in the future and that the statutory immunity was therefore insufficient to displace the privilege. The Court rejected that argument, concluding that the threat of incrimination with respect to offenses the defendant might commit in the future was not "substantial and 'real' " (401 U.S. at 606). The defendant's argument, the Court held (401 U.S. at 606-607),

> assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

The Court therefore held that the statutory immunity from the use of the registration materials to prove any past or current crimes was sufficient to overcome the defendant's assertion of his Fifth Amendment privilege.[14]

In his concurring opinion, Mr. Justice Brennan expanded on this point, noting that the privilege "does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm." *United States* v. *Freed*, *supra*, 401 U.S. at 611 (Brennan, J., concurring). The immunity in the statute, prohibiting the use of information obtained in the registration forms with respect to past crimes, is "coextensive with the privilege" (401 U.S. at 612), Justice Brennan concluded, and the information can therefore lawfully be compelled without violating the privilege against compulsory self-incrimination.

The past-future distinction is supported not only by the inherent speculativeness that attends most claims of possible future incrimination, but also by consideration of the policies that underlie the constitutional privilege. The privilege is in essence a shield designed to protect an actual or potential criminal defendant from having the government pry from his lips statements that could be used to convict

[14] The Court also noted that, unlike the information in *Marchetti*, the information on the transfer form was not ordinarily made available to state and federal law enforcement agencies, 401 U.S. at 606, and for that reason as well, the defendant's fear of incrimination was insubstantial.

him of crime. *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 55. It is the product of a judgment by the Framers that the distastefulness of inquisitorial practices designed to produce a suspect's confession outweighs the value to the criminal justice process of requiring an accused to account for his actions.

As applied to a future offense, however, the privilege becomes a sword rather than a shield, and the balance of interests is quite different. At the time he is granted immunity, a witness's testimony ordinarily cannot incriminate him with respect to a crime he has not yet committed. Thus, the effect of immunizing the witness from the use of his testimony to prove a subsequent offense is simply to permit the individual to commit that crime free of the risk that his prior testimony can be used to convict him. There is nothing in the laudable policies underlying the privilege that would justify this kind of extension of its sweep.

4. *Petitioner's receipt of immunity did not bar the use of his testimony to prove the falsity of his subsequent sworn statements*

In this case, of course, petitioner did not invoke the privilege on grounds of possible incrimination as to any future offense; rather, he presented a valid claim of privilege based upon the risk of incrimination as to already consummated offenses. Petitioner contends that upon making a legitimate claim of the privilege, he acquired a comprehensive immunity

against any prospective use whatsoever of truthful testimony given under compulsion.

a. We submit that the immunity acquired is not so all-encompassing, but instead is precisely co-extensive with the scope of the privilege available to the witness at the time the testimony was compelled. The Constitution does not require that the grant of immunity protect a witness from dangers that fall outside the protection of the privilege. *Ullmann* v. *United States*, 350 U.S. 422, 430-431, 438-439 (1956); *Heike* v. *United States*, 227 U.S. 131, 142-143 (1913); Korman, *The Use of Testimony Compelled Under a Grant of Use Immunity*, 44 Brooklyn L. Rev. 935, 940 (1978).[15] Thus, the legitimacy of any proposed use of the compelled testimony can be ascertained by determining whether, at the time he was called upon to give that testimony, the witness could successfully have invoked his privilege to guard against that use. If he could, then by compelling the testimony over a claim of the privilege, the government forgoes the ability to make that use of the testimony. On the other hand, if the use that the government proposes to make of the immunized testimony could not have been adduced as a valid basis for claiming the privilege, the immunity does not protect against that use.

[15] For example, a witness cannot assert the privilege to escape liability in a civil suit, or disgrace in the community, or even the loss of a job or some other non-criminal sanction. *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-285 (1968); VIII J. Wigmore, *Evidence*, *supra*, at §§ 2254-2255. He cannot even assert the privilege because he fears for his life if he testifies. *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961). It is therefore unnecessary for the grant of immunity to protect against those consequences in order to displace the privilege. *Ullmann* v. *United States*, *supra*, 350 U.S. at 430-431; *Smith* v. *United States*, 337 U.S. 137, 147 (1949); *Brown* v. *Walker*, *supra*, 161 U.S. at 605-606.

In the present case, as we have noted, petitioner was privileged to decline to testify with regard to drug dealings at the Colorado State Penitentiary. For that reason, the grant of immunity under which his grand jury testimony was compelled precludes the use of his testimony or its fruits to help convict him of any of the activities about which he was questioned.

Similarly, if petitioner had previously given a false sworn statement about the matters as to which he was questioned before the grand jury, he could validly have asserted his privilege not to testify because of the risk that his truthful testimony before the grand jury would expose him to a prosecution for perjury or false declarations. See *United States* v. *Housand*, 550 F.2d 818, 823 (2d Cir.), cert. denied, 431 U.S. 970 (1977). For that reason, a grant of immunity would protect him from the use of his testimony to prove the prior perjury. *In re Grand Jury Proceedings*, 509 F.2d 1349, 1351 (5th Cir. 1975); *United States* v. *Watkins*, 505 F.2d 545, 546 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

On the other hand, if petitioner had declined to testify on the ground that his truthful answers before the grand jury would be incriminating should he

later choose to give materially inconsistent testimony, his claim of privilege would not have been sustained. See *Kronick* v. *United States*, 343 F.2d 436, 441 (9th Cir. 1965). In effect, his claim would have been that without the protection of the privilege he would not be as free to perjure himself in the future, since he would be subject to prosecution for making a statement inconsistent with his grand jury testimony. This impediment to his ability to perjure himself in the future is not a "real danger of legal detriment arising from the disclosure." *Rogers* v. *United States*, 340 U.S. 367, 372-373 (1951). A possible future act of perjury, even a planned one, is not the kind of criminal exposure that the privilege against compulsory self-incrimination was intended to reach. The Self-Incrimination Clause does not extend "insulation for a career of crime about to be launched" (*United States* v. *Freed*, *supra*, 401 U.S. at 607), even if the "career" is one of perjury.[16]

[16] This Court's decision in *Cameron* v. *United States*, 231 U.S. 710 (1914), is not to the contrary. In that case, the defendant was indicted for perjuring himself in two related bankruptcy proceedings. The prosecution sought to use his testimony in the first proceeding to prove that his testimony in the second was false, and vice versa. The Court held that this was improper under the applicable immunity statute. Although the statute authorized prosecutions for perjury committed under a grant of immunity, it prohibited the use of any immunized testimony "in any criminal proceeding." The Court construed the statute to permit the government to use the allegedly false statements in each proceeding to prove perjury in that proceeding, but not to use the statements to prove perjury in the other proceeding. The Court made it clear that its opinion was based on a construction of the applicable immunity statute, and not on any constitutional prohibition. See 231 U.S. at 721, 724.

Accordingly, because petitioner in this case could have expected no protection from his Fifth Amendment privilege for a possible future act of perjury, it follows that there is no constitutional barrier to the use of his immunized grand jury testimony, even if truthful, to establish the falsity of his subsequent inconsistent testimony.[17]

b. Relying on language in *Kastigar* v. *United States*, *supra*, 406 U.S. at 458-459, and *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 79, petitioner argues (Br. 22) that his immunized testimony cannot be used "in any respect" and that the Constitution requires that the immunity order leave him "in substantially the same position as if he had remained silent."

Petitioner's construction of the language from *Murphy* and *Kastigar* is far too broad. In stating that the government could not use testimony compelled under a grant of immunity "in *any* respect" (406 U.S. at 453; emphasis in original), the Court in *Kastigar* was distinguishing between "use and de-

[17] Our argument is significantly different from that made by the State in *New Jersey* v. *Portash*, No. 77-1489, argued December 5, 1978. In *Portash*, the State seeks to use the defendant's immunized testimony to impeach his testimony at his subsequent trial for the substantive offenses about which he had testified before the grand jury. Thus, in that case, the imumnized testimony would be employed to help the State establish the defendant's guilt of the same crime as to which he initially claimed the privilege and as to which his privilege was overriden by a grant of immunity. In the instant case, by contrast, the immunized testimony is being used to prove a crime that had not occurred at the time petitioner was granted immunity and as to which he then had no testimonial privilege.

rivative use" immunity, which it held constitutionally sufficient, and the more limited "use" immunity that was held insufficient in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). In order for the immunity to be commensurate with the privilege, the Court stated in *Kastigar*, the government must be denied not only the right to use compelled testimony as evidence at trial, but also the right to use the testimony to develop leads and strengthen its case against the defendant in indirect ways.

This is a far cry, however, from petitioner's sweeping claim that immunized testimony can never be used against the witness, or that the grant of immunity must put him in the same position he would have been in if he had remained silent. As we have noted (see page 48, *supra*), immunized testimony can be used for a number of purposes: it can be used to prove that the testimony was perjured; it can be used against the witness in civil proceedings; and it can be used to deny the witness a job or other important benefits that he might have continued to enjoy had he remained silent. It is therefore inaccurate to say that the grant of immunity prohibits the government from making any use whatever of the compelled testimony.

What *Murphy* and *Kastigar* in fact establish is that the Constitution prohibits the use of compelled testimony for any purpose as to which a claim of privilege would be upheld. Thus, an immunized witness may be prosecuted for testifying falsely under a grant of immunity because, if he had claimed the

privilege on the ground that he might lie before the grand jury, his claim would have been rejected and he could have been required to testify without immunity. In other words, an immunity grant provides the same protection against prosecution for contemporaneous perjury that the privilege does: that is, no protection at all.

Similarly, if petitioner had refused to testify before the grand jury on the ground that his testimony might be used to incriminate him if he should choose to perjure himself in some future proceeding, his claim of privilege would have been rejected, and petitioner would have been required to testify. He is therefore in the same position that he would have been in if he had invoked his privilege on that ground and his claim had properly been denied. To grant petitioner any broader protection would depart from the principle that the scope of the immunity must be equal to, but ought not be greater than, the scope of the privilege.

This point is perhaps best underscored by comparing the protection that petitioner would have obtained under the previous system of transactional immunity with the protection that he is claiming in this case. A grant of transactional immunity provides the witness protection from prosecution for any offense about which he is required to testify. Even under transactional immunity, however, the witness enjoys no protection with respect to testimony as to which he could have asserted no privilege.

In *Heike* v. *United States*, *supra*, for example, the government granted transactional immunity to a witness in an antitrust investigation. The witness was later indicted on tax fraud charges only remotely related to the matters at issue in the antitrust investigation. The Court held that the portions of his grand jury testimony that related to the fraud charges were not incriminating, and that the witness could not have made a valid claim of the privilege with respect to that testimony. Therefore, the Court held, the witness's immunity provided no protection against his subsequent prosecution for tax fraud.

Similarly, in *People* v. *Woodson*, 309 Mich. 391, 15 N.W.2d 679 (1944), a case very similar to this one except that it arose under a transactional immunity statute, the court held that the defendant's immunized grand jury testimony could be used to prove a later act of perjury. The transactional immunity statute protected the defendant against prosecution for any offense concerning which his testimony might tend to incriminate him, the court held, but the immunity did not extend to a later act of perjury because his immunized testimony did not relate to that offense at the time it was given.

The Court in *Murphy* and *Kastigar* clearly did not intend to suggest that use immunity is broader in any respect than transactional immunity. Accordingly, the statements in those cases that immunized testimony may not be used in "any way" must be interpreted to apply only to uses that the witness

could have avoided by a timely assertion of the privilege.

c. Petitioner relies (Br. 27) on dicta from several court of appeals opinions to support his argument here. Both *United States* v. *Berardelli*, 565 F.2d 24 (2d Cir. 1977), and *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977), were appeals by witnesses who had been held in contempt for refusing to testify, despite a grant of immunity. In both cases, the witnesses gave as their ground for insisting upon their privilege against compulsory self-incrimination in the face of the immunity grant the fear that their answers, if inconsistent with prior testimony they had given, might be used to convict them of making false declarations under the inconsistent statements theory of 18 U.S.C. 1623(c). In *United States* v. *Housand*, 550 F.2d 818 (2d Cir.), cert. denied, 431 U.S. 970 (1977), a prospective defense witness who had earlier testified before the grand jury under a grant of immunity refused, in the absence of a new grant of immunity, to testify at trial. The witness's refusal was upheld by the district court, and the defendant challenged the correctness of that ruling on appeal.

The contempt convictions of Patrick and Berardelli were affirmed, while Housand's claim was rejected. Each opinion explicitly, although unnecessarily and with little supporting analysis, stated that no incriminating use of any kind could be made of truthful immunized testimony, even to prove a later

perjury. See also *United States* v. *Apfelbaum*, 584 F.2d 1264 (3d Cir. 1978), petition for cert. pending, No. 78-972. Thus, the courts each stated that it would violate the witness's Fifth Amendment privilege to use statements he made under a grant of immunity to prove that he later gave inconsistent testimony while not immunized.

The results in *Berardelli*, *Housand*, and *Patrick* were correct without regard to their dicta and are not inconsistent with the result in this case. In each of those cases, the witness, having previously testified, was called to testify on the same subject a second time. In each case, he invoked his privilege on the ground that truthful testimony on the second occasion might tend to establish the falsity of his prior testimony, thereby incriminating him. Each invocation of the privilege was plainly proper and foreclosed the compulsion of testimony without a grant of immunity. In each instance, moreover, the grant of immunity would have precluded the use of the testimony at the second appearance to establish the falsity of the prior testimony, whether pursuant to an inconsistent statements theory or otherwise. Since this is so, there was no necessity for the courts to express any view about the use that might be made of any immunized testimony, truthful or otherwise, given during an earlier appearance.

In the instant case, by contrast, petitioner's second, inconsistent testimony was volunteered. He could have invoked his privilege to refuse to give that testimony without a grant of immunity, but he did not do so. Accordingly, there was here no potential for

the use of compelled, immunized testimony against petitioner to incriminate him with respect to prior unlawful conduct. *Berardelli*, *Housand*, and *Patrick* thus afford no substantial support for petitioner's objection to the use of his immunized grand jury testimony against him in this false declarations prosecution.

B. The Federal Immunity Statute Does Not Prohibit the Use of Truthful, Immunized Testimony to Prove the Falsity of Subsequent, Non-immunized Testimony

Petitioner argues (Br. 23-30) that even if the use of his immunized testimony that was allowed in this case does not violate the Fifth Amendment, it is nevertheless prohibited by the federal immunity statute, 18 U.S.C. 6002. Petitioner concedes, as he must, that the plain language of the immunity statute permits the use of immunized testimony in a prosecution for perjury or giving a false statement. But he argues that the language of the statute is meant to apply only to perjury or false statement prosecutions in which the government has charged that the false statement was made during immunized testimony.

It is beyond dispute that the statutory reference to prosecutions for "giving a false statement" includes prosecutions brought under 18 U.S.C. 1623, the federal false declarations statute.[18] See *United*

[18] Petitioner suggests otherwise (Br. 26), but as we shall show, the legislative history of the Act makes it clear that the reference to "false statements" was intended to encompass "false declarations" prosecutions brought under 18 U.S.C. 1623.

States v. *Anzalone*, 555 F.2d 317 (2d Cir. 1977). Petitioner can therefore prevail on the statutory issue only if the immunity statute was intended to exclude those false declarations prosecutions in which the government proceeds under the inconsistent declarations method of proof authorized by subsection (c) of Section 1623. The legislative history of the immunity statute reveals no congressional intent to carve out an exception for that type of false declarations prosecution.

1. ***The legislative history of the immunity statute shows that Congress intended to provide only such immunity as is constitutionally required***

The immunity statute applicable to this case, 18 U.S.C. 6002, was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, Section 201(a), 84 Stat. 927. It was drafted in response to a reexamination of the constitutional principles applicable to immunity, prompted in part by the decision in *Murphy* v. *Waterfront Commission*, *supra*, which indicated that current federal immunity statutes that granted broad transactional immunity provided more protection than was required by the Constitution. See *Kastigar* v. *United States*, *supra*, 406 U.S. at 452 & n.36. In both the Senate and House reports on the proposed legislation, it was made clear that the purpose of the new provision was to narrow the scope of a grant of immunity to precisely what the Constitution requires, and no more:

> This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892).

S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 42 (1970). See also S. Rep. No. 91-617, *supra*, at 107-108 (comments of Department of Justice).

The proposal for the federal use immunity statute derived from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws. See II *Working Papers of the National Commission on Reform of Federal Criminal Laws* 1445-1448 (1970). The report proposed a general federal use immunity statute under which "the immunity conferred would be confined to the scope required by the fifth amendment" (*id.* at 1405). See also *Senate Hearings*, *supra*, at 326.

The statements of the sponsors of the bill, like the comments in the House and Senate Reports, reflect a general understanding that the bill would restrict immunity to the scope required by the Constitution. Senator McClellan, the chief sponsor of the bill in the Senate, emphasized that the bill was designed to provide only the minimum required immunity. "Giving immunity where it is not necessary," he stated, "is giving an unnecessary gratuity to a crime, a step

no sane society ought ever to take." 115 Cong. Rec. 5879 (1969).[19] Representative Poff, the chief sponsor in the House, observed that the bill would give a witness "all that is guaranteed him under the Constitution" (116 Cong. Rec. 35291 (1970)). Quoting Mr. Justice White's observation in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. at 107, he added that "'[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege

[19] The language of the statute proposed by the Commission was largely similar to that found in the present statute. The pertinent portion of the Commission's proposal read (II *Working Papers*, *supra*, at 1447):

> [N]either the testimony nor other compelled disclosures of the witness, nor any information or evidence derived therefrom, shall be used against the witness in any criminal case, except a prosecution for perjury or any other offense constituting a failure to comply with such direction.

The initial draft of S. 30, the bill that ultimately became the Organized Crime Control Act of 1970, contained a somewhat different immunity provision. Like the Commission's proposal, it provided for use and derivative use immunity rather than transactional immunity. But, among other differences, it contained a narrower description of the cases in which immunized testimony could be used than the Commission's proposal. The initial S. 30 provision prohibited the use of immunized testimony in any proceeding "other than in connection with a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section." S. 30, 91st Cong., 1st Sess. (1969), reprinted in *Senate Hearings*, *supra*, at 14. At the suggestion of the Department of Justice, that provision was discarded in favor of the Commission's proposal. With minor language changes, the Commission's proposal was introduced as S. 2122 and was ultimately incorporated as part of the Act. See S. Rep. No. 91-617, *supra*, at 55.

against self-incrimination'" (116 Cong. Rec. 35291 (1970)).

These legislative materials make it clear that Congress did not intend to grant any broader protection to an immunized witness than is required by the Constitution. The statute therefore should not be construed, as petitioner seeks, to impose an additional and more stringent limitation on the uses to which immunized testimony may be put.

Finding the legislative history "unclear," petitioner argues (Br. 24-25) that the wording of the last clause of the immunity statute suggests a narrow construction of the uses to which immunized testimony may be put. That clause prohibits the use of immunized testimony in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the [immunity] order." Because the last of these specified exceptions starts with the words "or otherwise," petitioner argues that Congress must have intended all the exceptions to be limited to cases in which the witness has failed to comply with the order, either by testifying falsely or by refusing to testify at all. See *United States* v. *Berardelli*, *supra*, 565 F.2d at 29; *United States* v. *Patrick*, *supra*, 542 F.2d at 385-386; *United States* v. *Alter*, 482 F.2d 1016, 1028 (9th Cir. 1973).

While that is certainly a plausible interpretation of the statutory language,[20] it is not a necessary one.

[20] As petitioner correctly points out, the government has endorsed that construction previously. See *United States* v.

In light of the strong indication in the legislative history that Congress meant to permit the use of immunized testimony to the extent permissible under the Constitution, and in light of the unpalatable result that petitioner's construction produces in cases such as this, we submit that the statute should not be given such a restrictive construction.

The fact is that the exceptions clause was not added for the purpose of limiting the use to which immunized testimony could be put. The list of exceptions was added for quite the opposite reason: to forestall a construction that would unnecessarily restrict the uses to which immunized testimony could be put. As both the Senate and House reports stated: "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. * * * It is included out of caution to insure that such immunity is not given." S. Rep. No. 91-617, *supra*, at 145; H.R. Rep. No. 91-1549, *supra*, at 42. Congress thus assumed, in accordance with decisions of this Court, that the ostensibly restrictive language of use immunity statutes would not preclude uses of immunized testimony that are not inconsistent with the Constitution. See *United States* v. *Bryan*, *supra*, 339 U.S. at 338-340; *Heike* v. *United States*, *supra*, 227 U.S. at 141; *Glickstein* v. *United States*, *supra*.

In both *Glickstein* and *Bryan*, the Court construed immunity statutes to permit uses of immunized testimony consistent with the Constitution, but not specified in the pertinent immunity statute. In *Glick-*

Alter, *supra*. We now believe, for the reasons given here, that the position advanced in *Alter* is incorrect.

stein, the Court construed a statute that prohibited the use of immunized testimony "in any criminal proceeding" to permit its use in a prosecution for perjury (222 U.S. at 143), and in *Bryan*, the Court construed an immunity statute that prohibited the use of immunized testimony "in any criminal proceeding against [the witness] in any court, except in a prosecution for perjury committed in giving such testimony" to permit the use of immunized testimony in a prosecution for contempt (339 U.S. at 342). The Court in those cases observed that the term "in any criminal proceeding" was added " 'only from superfluous caution and throws no light on the construction.' " *United States* v. *Bryan*, *supra*, 339 U.S. at 342; *Glickstein* v. *United States*, *supra*, 222 U.S. at 143.

Because the "exceptions" clause in Section 6002, like the even narrower exceptions clauses in *Bryan* and *Glickstein*, was inserted solely as a precaution against a restrictive reading of the statute, the clause should not be read to impose restrictions on the use of immunized testimony that would not have been imposed in its absence. For that reason, the term "criminal case" in Section 6002 should be construed to refer to criminal prosecutions for or relating to the conduct about which the witness testified, not to any criminal prosecution that may be brought for misconduct committed by the witness in the course of his testimony or afterwards.[21] See *United States* v. *Tramunti*, *supra*.

[21] Petitioner's construction of the statute would produce anomalous results. For example, under petitioner's construc-

2. *Prosecutions under Section 1623 were intended to be among the prosecutions for "giving a false statement" under the immunity statute*

Petitioner contends that although the statute permits the use of immunized testimony in a conventional perjury or false statements prosecution, it prohibits the use of immunized testimony in a false declarations case based upon the inconsistent statements theory of Section 1623(c). Even if petitioner can overcome the manifest intent of Congress that the immunity statute should not be construed to restrict any use of immunized testimony that is permissible under the Constitution, his contention nevertheless fails because the legislative history of the false declarations statute, 18 U.S.C. 1623, demonstrates that the use of immunized testimony in a false declarations prosecution is permissible even when the government uses the "inconsistent declarations" method of proof.

The false declarations statute, 18 U.S.C. 1623, like the federal use immunity statute, was enacted as part of the Organized Crime Control Act of 1970.[22] It was designed to make false swearing easier to prove by doing away with several common law rules of evidence that traditionally had applied to prosecu-

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tion, if a witness committed a crime in the grand jury room, such as offering the grand jurors a bribe, the testimony that constituted the offense could not be introduced against him, even though the Constitution would plainly not forbid that use.

[22] The immunity provisions were contained in Title II of the Act, while the false declarations statute was contained in Title IV. Pub. L. No. 91-452, Section 401(a), 84 Stat. 932.

tions under the federal perjury statute, 18 U.S.C. 1621. In order to facilitate prosecutions for false swearing before or ancillary to a grand jury or a court, Congress therefore made the common law rules such as the two-witness rule and the direct-evidence rule inapplicable to prosecutions under Section 1623. This step, it was thought, would result in "greater assurance that testimony obtained in grand jury and court proceedings will aid the cause of truth." S. Rep. No. 91-617, *supra*, at 57-59; see also H.R. Rep. No. 91-1549, *supra* at 33. In addition, in order further to ease the traditional difficulties faced by the prosecution in perjury cases, Congress provided that contradictory statements under oath could supply the basis for a perjury prosecution without specific proof of the falsity of one of the statements. 18 U.S.C. 1623(c); S. Rep. No. 91-617, *supra*, at 58.

One of the main reasons that Congress sought to facilitate prosecutions for false swearing was to provide meaningful sanctions to ensure that immunized testimony would be truthful. See S. Rep. No. 91-617, *supra*, at 58. In explaining the liberalized provisions for proving a false declarations offense, Senator McClellan observed (115 Cong. Rec. 5880 (1969)):

> A subpena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. The threat of imprisonment for civil contempt can legitimately coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction,

can provide any guarantee that his testimony will be truthful.

Similarly, during the debate in the House, Representative Poff emphasized that the provisions in the statute facilitating the proof of false declarations would be equally applicable to prosecutions involving immunized testimony (116 Cong. Rec. 35292 (1970)):

> The integrity of the criminal trial depends upon the power to compel truthful testimony and to punish falsehood. Witness immunity such as title II will provide can be an effective prosecutive weapon only if the immunized witness testifies truthfully. The infrequency of the use of perjury sanctions—due to the difficulty of securing convictions under existing law—has limited the effectiveness of established criminal sanctions for false statements under oath.

Thus, far from intending to exclude the use of compelled testimony in false declarations prosecutions, Congress was concerned with guaranteeing the truthfulness of all types of formal testimony, including that of immunized witnesses, when it introduced the liberalized proof provisions embodied in Section 1623.[23] The fact that the language of the immunity

[23] Petitioner's argument (Br. 26) that the cases cited in the legislative history concern only the traditional type of perjury such as that prohibited by 18 U.S.C. 1621, and that Congress therefore must have intended an exception no broader than that allowed by earlier statutes, is plainly flawed. Because Congress was only then enacting the new false declarations statute, there were obviously no cases interpreting the previously nonexistent offense. What is far more significant is that when Congress decided to add the new false declarations statute to the Act, it added parallel language to the proposed immunity statute referring not only to "perjury," but to "giving a false statement" as well. See page 60, note 19, *supra*.

statute makes no specific reference to a prosecution based on the inconsistent statements theory of proof is neither surprising nor significant. The immunity statute plainly was intended to permit the use of immunized testimony to prove a false declarations offense. The inconsistent statements theory is simply an alternative method of proving a violation of that statute, and it could hardly be expected that it would be mentioned separately from (and redundantly to) the false declarations offense with which it is associated.

The basic reason for the traditional rule that the government can prosecute a witness for lying under a grant of immunity applies as well to cases in which the witness makes subsequent sworn statements inconsistent with his grand jury testimony. Perjured testimony is, of course, worthless to the grand jury. Therefore, if there is no effective sanction for perjury, the grand jury cannot be reasonably assured of getting useful testimony in exchange for the immunity granted to the witness. Similarly, if an immunized witness gives one story in the grand jury room and a contrary story at trial or in some other proceeding, his recantation frustrates the purpose of the grant of immunity just as much as if he had originally lied or refused to testify. Once the witness claims under oath that his previous sworn testimony

was untrue, it no longer matters which statement is true and which is false. The value of his testimony is impaired as effectively as if he had given two contradictory answers to the grand jury in response to every question.[24] Under petitioner's theory, unless the government has some reliable way of proving which of his two statements was false, he is free to repudiate his grand jury testimony with impunity. That, we submit, was not what the Congress that passed the false declarations and use immunity statutes had in mind.

For these reasons, we submit that it is not justified in this case to ignore the plain language of the immunity statute, which permits the use of immunized testimony in a prosecution, such as this one, for "giving a false statement."

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[24] Although it would require a particularly brazen witness to engage in such a practice, his situation would not be materially different from petitioner's. If petitioner is correct that the government cannot employ the inconsistent statements theory of proof to show that one of his two statements was false, the same argument would apply to the witness who gave two contradictory answers to every question. The argument, identical to petitioner's, would be that neither statement can be used because either may be true, even though it is clear that both are not. Thus, unless the government could establish by independent evidence that one of the statements was in fact false, it would have no way to punish the witness in spite of the fact that he, like petitioner here, would indisputably have perjured himself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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